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No. 82-938

In the Supreme Court of the United States

October Term, 1982

DANIEL T. PAUER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATUTORY PROVISIONS

OHIO REV. CODE ANN. §2901.22(B) (Page):

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

OHIO REV. CODE ANN. §2925.01(A) (Page):

> As used in this chapter:
>
> (A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacturer," "marijuana," "official written order," "pharmacist,"

"pharmacy," "practitioner," "prescription," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meaning as in section 3719.01 of the Revised Code.

OHIO REV. CODE ANN. §2925.01(G) (Page):

As used in this chapter:

(G) "Cultivate" includes planting, watering, fertilizing, or tilling.

OHIO REV. CODE ANN. §2925.01(K) (Page):

As used in this chapter:

(K) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

OHIO REV. CODE ANN. §3719.01(D) (Page):

As used in Chapter 3719 of the Revised Code:

(D) "Controlled substance" means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V.

OHIO REV. CODE ANN. §3719.41, Schedule I(C)(10) (Page):

Controlled substance schedules I, II, III, IV, and V are hereby established, which schedules include the following, subject to amendment [by the state board of pharmacy] pursuant to section 3719.43 or 3719.44 of the Revised Code.

(C) Hallucinogens

Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted under federal drug abuse control laws, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation. For the purposes of this division only, the term "isomers" includes the optical, position, and geometric isomers:

(10) Marijuana

STATEMENT OF THE CASE

Danielle Pauer, daughter of the petitioner, met with Lt. James Cogan of the Chester Township Police Department and stated that in her parents' residence were green plants which she had been told were marijuana. The petitioner's daughter gave leaves from these plants to the officer. The leaves were field tested with a positive result for marijuana.

An affidavit for a search warrant was prepared by Lt. Cogan and presented to the Chardon Municipal Court judge. The judge issued a search warrant on March 8, 1979 authorizing a search in the daytime of petitioner's residence.

In executing the search of the petitioner's residence, the police officers found a quantity of green plants in the master bedroom under a surveyor's transit on which was a hat owned by the petitioner. Another number of green plants were found in the basement on shelves constructed of boards and cinder blocks. The green plants were sent to a forensic laboratory where, by chemical analysis, they were determined to be marijuana plants.

On May 21, 1979, the grand jury of Geauga County, Ohio, returned a one count indictment charging the petitioner with trafficking in marijuana, a felony of the fourth degree in violation of OHIO REV. CODE ANN. §2925.03(A)(3) (Page).

Prior to trial, the trial court overruled the petitioner's motions to dismiss the indictment and suppress evidence. On September 25, 1979, a jury of the Geauga County Court of Common Pleas found the petitioner guilty of trafficking in marijuana as charged in the indictment. The petitioner was sentenced on January 8, 1980 to a minimum term of two

years and a maximum term of five years in the state penitentiary and fined five hundred dollars. The trial court immediately suspended the execution of the sentence and placed the defendant on probation.

A motion for a new trial was subsequently filed by the petitioner on the grounds of newly-discovered evidence and juror misconduct. At the motion hearing, the trial court allowed two of the twelve jurors to testify concerning statements made by the jury foreman and what effect, if any, the statements had upon their determination of the petitioner's guilt. One juror testified that he would have voted guilty even without any statements having been made by the foreman. (Respondent's appendix, p. A1.) The other juror stated that the foreman's statements had no influence upon her vote of guilty. (Respondent's appendix, p. A2.) The trial court overruled the petitioner's motion for a new trial.

The petitioner appealed his conviction to the Ohio Court of Appeals, Eleventh District which affirmed the judgment of conviction on April 1, 1982. On September 15, 1982, the Supreme Court of Ohio overruled the petitioner's motion for leave to appeal and dismissed his appeal as of right.

On December 6, 1982, the petitioner's petition for a writ of certiorari was docketed in this Court.

SUMMARY OF ARGUMENT

A The petitioner was not denied a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States on the grounds of juror misconduct.

B. OHIO REV. CODE ANN. §2925.03(A)(3) (Page), trafficking in marijuana, is not void for vagueness.

C. The trial court's denial of an evidentiary hearing to challenge the truthfulness of the factual statements in the affidavit supporting the search warrant in this case was in accordance with this Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978).

D. The search of the petitioner's residence, upon warrant based on probable cause, for contraband is reasonable and not violative of the Fourth and Fourteenth Amendments of the Constitution of the United States.

E. The evidence presented at the petitioner's trial was sufficient to support his conviction as a matter of law and thus the petitioner was not denied due process of law under the Fourteenth Amendment of the Constitution of the United States.

F. The provision of OHIO REV. CODE ANN. §2925.03(F) (Page) which provides for an affirmative defense of personal use, does not violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT

A. THE PETITIONER WAS NOT DENIED A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES ON THE GROUNDS OF JUROR MISCONDUCT.

The extraneous remarks made by the jury foreman in the case at bar did not cause the jurors who came forward to change their vote and therefore did not deny the petitioner any of his rights under the Constitution of the United States. Both jurors testified that any extraneous remarks did not affect their verdict and that they made their decision based upon the evidence before them at the trial, when asked at the hearing held by the trial court. (Respondent's appendix, pp. A1, 2.)

There was no evidence presented at the new trial hearing which would show that the remarks of the foreman influenced any jurors or that they failed to decide the case upon the evidence submitted in open court and the law as instructed by the trial judge. There was no material prejudice to the rights of the accused. The trial court properly overruled the defense motion for a new trial.

> We recognize that what is prejudicial to a fair trial when the issue of juror misconduct is raised, is a matter that must, to a large extent, be left to the discretion of the trial court and that an appellate court will not reverse on such an issue unless it is established as clearly erroneous.

United States v. Bohr, 581 F.2d 1294, 1302 (8th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); *Little v. United States*,

331 F.2d 287, 295 (8th Cir. 1964), *cert. denied*, 379 U.S. 834 (1964). In the case at bar, the decision of the trial court to not grant a new trial has not been established as "clearly erroneous."

B. OHIO REV. CODE ANN. §2925.03(A)(3) (PAGE), TRAFFICKING IN MARIJUANA, IS NOT VOID FOR VAGUENESS.

This Court has held that, as a matter of due process, a criminal statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Hariss*, 347 U.S. 612, 617 (1954), and that it must not be so indefinite that "it encourages arbitrary and erratic arrests and convictions." *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Statutes which do not meet these tests are constitutionally void for vagueness. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979). "This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 392.

The provisions of OHIO REV. CODE ANN. §2925.03(A)(3) (Page) describe with reasonable certainty the conduct which is forbidden. The statute states:

> (A) No person shall knowingly do any of the following: . . .
>
> (3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance.

The various terms employed in the statute are defined in other sections of Ohio's criminal code. "Knowingly" is defined in OHIO REV. CODE ANN. §2901.22(B) (Page);

"manufacture" is defined in OHIO REV. CODE ANN. §2925.01 (K) (Page); and "controlled substance" is defined in OHIO REV. CODE ANN. §§2925.01(A), 3719.01(D) and 3719.41 Schedule I (C)(10) (Page). "Cultivate" is defined in OHIO REV. CODE ANN. §2925.01(G) (Page) as follows:

> "Cultivate" includes planting, watering, fertilizing, or tilling.

The provisions of OHIO REV. CODE ANN. §2925.03 (A)(3) (Page) "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." The statute proscribes, in terms understandable to lay individuals, that it is illegal to grow marijuana in the State of Ohio. The statute is not so indefinite that "it encourages arbitrary and erratic arrests and convictions" and certainly does not "threaten to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 389, 390 (1979).

C. THE TRIAL COURT'S DENIAL OF AN EVIDENTIARY HEARING TO CHALLENGE THE TRUTHFULNESS OF THE FACTUAL STATEMENTS IN THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT IN THIS CASE WAS IN ACCORDANCE WITH THIS COURT'S DECISION IN FRANKS v. DELAWARE, 438 U.S. 154 (1978).

This Court in the case of *Franks v. Delaware*, 438 U.S 154 (1978), held that a defendant under limited circumstances could challenge the veracity of allegations in an affidavit to obtain a search warrant. This Court held that:

> . . . where the defendant makes a *substantial preliminary showing* that a false statement *knowingly and intentionally, or with reckless disregard for the*

> *truth*, was included by the affiant in the warrant affidavit, and *if the allegedly false statement is necessary to the finding of probable cause*, the Fourth Amendment requires that a hearing be held at the defendant's request. (Emphasis added.)

Id. at 155, 156.

In the case at bar, no affidavits or otherwise reliable statements of witnesses were furnished to the trial court and their absence was not satisfactorily explained. In *Franks v. Delaware*, *I.* at 171 this Court embellished on its holding as follows:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and *those allegations must be accompanied by an offer of proof*. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.* Allegations of negligence or innocent mistake are insufficient. (Emphasis added.)

The mere representations of the defendant's lawyer as to what some witnesses might say is not the type of "substantial preliminary showing" or "offer of proof" required by this Court in *Franks*.

The defendant's attorney made a proffer that his evidence would show that the informant may not have made her statement in the physical presence of the affiant and that the affiant might not have been present during the

entire time that the informant was writing her statement. The affiant did question her however, and the affiant witnessed her signing of the statement. The informant was the petitioner's daughter, aged 12, who resided with the petitioner and voluntarily brought her information to the officials.

Even, assuming *arguendo*, that these statements were false, there was no substantial preliminary showing that they were made "knowingly and intentionally, or with reckless disregard for the truth." Also, the allegedly false statement as to the affiant's physical presence at the time the informant wrote her written statement is not necessary to the finding of probable cause. The substance of the informant's statement is necessary to the finding of probable cause, however, there was no showing made that the substance of the informant's statement was in any manner false.

Thus, the trial court properly denied the petitioner an evidentiary hearing as to the truthfulness of the facts in the warrant affidavit under the decision of this Court in *Franks v. Delaware*, 438 U.S. 154 (1978).

D. THE SEARCH OF THE PETITIONER'S RESIDENCE, UPON WARRANT BASED ON PROBABLE CAUSE, FOR CONTRABAND IS REASONABLE AND NOT VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

In the case at bar, the informant (petitioner's daughter) came to the police with reliable information that her parents had marijuana plants growing inside their home and that she had seen the live plants recently. She even presented a leaf of one of the plants to the police, which tested positive for marijuana.

The number of plants reported gave the law enforcement officials and the municipal court judge probable cause to believe that the alleged plants were being grown for more than mere personal use. The cultivation of marijuana is a felony of the fourth degree under OHIO REV. CODE ANN. §2925.03(A)(3) (Page). Thus, the law enforcement officers searched the petitioner's residence pursuant to a valid search warrant for evidence of a felony. Their search was for contraband, *i.e.* marijuana. A search for contraband on a warrant issued upon a showing of probable cause has always been considered reasonable under the Fourth Amendment. *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).

E. THE EVIDENCE PRESENTED AT THE PETITIONER'S TRIAL WAS SUFFICIENT TO SUPPORT HIS CONVICTION AS A MATTER OF LAW AND THUS THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In the case at bar, the substantial evidence produced by the state consisted of the facts that the petitioner permanently resided at the residence searched, slept in the bedroom where the marijuana plants were found, had his hat on top of a transit which had been specifically modified to accommodate a grow light for the marijuana plants, and had constructive control of the basement area where marijuana plants were illuminated by a grow light and supported by a specially constructed set of shelves comprised of boards and building blocks. It is also to be noted that the petitioner was a mason by trade. These facts, along with the statements by the petitioner's daughter that her parents used marijuana, justify the jury's obvious

conclusion that the petitioner knew the marijuana plants were in his home and participated in their growing and production.

Normally, this Court will not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a trial court. Such issues of fact are not an "important question of federal law" which should be settled by this Court. Rule 17.1(c), Rules of Practice of the Supreme Court of the United States; *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 503 (1951); 13 MOORE'S FEDERAL PRACTICE SC 17-43. ¶817.41.

F. THE PROVISION OF OHIO REV. CODE ANN. §2925.03(F) (PAGE) WHICH PROVIDES FOR AN AFFIRMATIVE DEFENSE OF PERSONAL USE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioner's claim is foreclosed by *Patterson v. New York*, 432 U.S. 197 (1977). *Patterson* makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses, such as personal use upon the defendant. *Patterson, supra.*

In *Patterson, supra,* the burden of persuasion was placed upon the defense to prove the existence of the mitigating circumstance by a preponderance of the evidence. This Court upheld such a burden and stated:

> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or pun-

> ishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.
>
> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. . . . Proof of non-existence of all affirmative defenses has never been constitutionally required; . . .

Patterson, supra at 209, 210.

In the case at bar, the trial judge properly instructed the jury under OHIO REV. CODE ANN. §2925.03(F) (Page). His instructions distinguished the elements of the crime of which the state had the burden of proof from the elements of the affirmative defense, on which the petitioner had the burden of proof. The Due Process Clause requires no more. *Patterson, supra.*

CONCLUSION

It is respectfully submitted that the petitioner has wholly failed to sustain his burden of establishing under Rule 17.1 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the state court decided a federal question in a way in conflict with applicable decisions of this Court or of another state court of last resort or of a federal court of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Relevant excerpts from the transcripts of evidence adduced at the hearing on the petitioner's motion for new trial in this action in the Court of Common Pleas of Geauga County, Ohio;

I. Testimony of juror, Roy J. Keim:

A. Cross examination by Assistant Prosecuting Attorney Richard J. Makowski (Transcript pp. 36, 37):

Mr. Makowski: Would you have signed, would you have agreed to a guilty verdict against Dan Pauer, based on the evidence that was presented in the courtroom, if Harry Kolsom had not made the statement about Dan Pauer suing the Chester Police?

Mr. Keim: I probably would have, yes.

B. Re-direct examination by defense attorney William C. Hofstetter (Transcript p. 42):

Mr. Hofstetter: Now, asking the same question that Mr. Makowski asked, but adding in that other information that you just stated that he said, he'd sue, that he didn't have a steady job, and the information about the shotgun, would you still have signed the verdict were it not for that information?

Mr. Keim: You mean if I wouldn't have heard that information?

Mr. Hofstetter: Right.

Mr. Keim: Yes, I still would have, guilty.

Mr. Hofstetter: And why is that?

Mr. Keim: Based upon the evidence I heard during the trial.

II. Testimony of juror Ruth Datsko:

A. Direct examination by defense attorney William C. Hofstetter (Transcript p. 48):

Mr. Hofstetter: Was there anything in the statements Mr. Kolsom said that influenced your decision to change your vote?

Mrs. Datsko: No.

B. Direct examination, continued (Transcript p. 49):

The Court: Are you telling us that Mr. Kolsom didn't influence you to change your vote?

Mrs. Datsko: No, absolutely he did not.

C. Direct examination, continued (Transcript pp. 51, 52):

Mr. Hofstetter: You still do not believe he's guilty?

Mrs. Datsko: No.

Mr. Hofstetter: Why then did you sign the verdict form?

Mrs. Datsko: Because they all said they wanted to talk it over. So, I just, under the pressure of the whole group I did.

Mr. Hofstetter: Do you recall?

Mrs. Datsko: Because it was getting late and I thought they wanted to go home. I thought they would get into trouble at home. That's all.